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July 5, 2019

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Re: Supplemental Letter Brief in *Texas v. United States*, Case No. 19-10011

Dear Mr. Cayce:

This letter provides the state defendants' response to three questions posed by the Court on June 26, 2019. First, the state defendants, who intervened in the district court shortly after this case was filed, have standing to maintain this appeal because they would be directly and concretely harmed if the judgment below were ever to take effect. *See Sierra Club v. Babbitt*, 995 F.2d 571, 574-575 (5th Cir. 1993). Second, there remains a live controversy between the plaintiffs and the federal defendants because the federal Executive Branch has appealed the judgment below, the United States would suffer legal harm from the implementation of that judgment, and the Executive Branch has indicated that it will continue enforcing the law absent a final judicial decision ordering it not to. *See United States v. Windsor*, 570 U.S. 744, 755-763 (2013). Third, if this Court

concludes instead that the federal defendants' change in legal position has mooted any original controversy and that no other defendant has standing to appeal, then the most appropriate course would be to vacate the judgment below, to ensure that it cannot have any collateral effect on parties that were, through no fault of their own, denied any opportunity for review. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950).

1. *Standing to appeal*. An intervenor has a "'right to continue a suit in the absence of the party on whose side intervention was permitted,'" so long as it independently "'fulfills the requirements of Art. III.'" *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 737 (5th Cir. 2016); *see also Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019) ("[T]o appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing."). Thus, an intervenor may prosecute an appeal on its own if it can show that it meets the requirements of "injury, causation, and redressability." *Sierra Club v. Babbitt*, 995 F.2d 571, 574 (5th Cir. 1993). In conducting that inquiry, this Court asks whether the intervenor seeking to appeal is injured by "*the judgment below*." *Id.* at 575 (emphasis in original).[1]

[1] The same analysis applies when a district court holds a law unconstitutional and the sovereign chooses not to appeal. *See Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 430 (6th Cir. 2008) (intervenors harmed by an adverse ruling may appeal a judgment that a state law is unconstitutional even if State elects not to); *see also United States v. Texas*, 158 F.3d 299, 303-304 (5th Cir. 1998) (rejecting argument

The state defendants are plainly injured by the district court's judgment here. The district court declared 26 U.S.C. § 5000A(a) unconstitutional, and further held the entire Patient Protection and Affordable Care Act "INSEVERABLE and therefore INVALID." ROA.2665 (emphasis omitted). If given effect, that judgment would cause direct financial harm to the state defendants. *See United States v. Fletcher ex rel. Fletcher*, 805 F.3d 596, 602 (5th Cir. 2015) (party has standing to appeal if it would "'suffer financial loss as a result of the judgment'").

Most obviously, the state defendants would lose billions of dollars in federal funds. Eliminating the Act's Medicaid expansion provisions alone would cost the original 16 intervening state defendants and the District of Columbia more than $418 billion over the next decade. *See* ROA.1148-1183; *see also* 42 U.S.C. §§ 1396a(a)(10)(A)(i)(VIII), (e)(14)(I)(i); 1396d(y)(1). States that have taken advantage of the ACA's Community First Choice Option (CFCO) program, which allows States to fund care for disabled and elderly individuals at home or in their communities instead of in institutions, stand to lose hundreds of millions more. *See* 42 U.S.C. § 1396n(k); *see also* ROA.1243 (eliminating CFCO would cost

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that intervenors did not have standing to appeal adverse ruling where state defendants chose not to); *cf. Hollingsworth v. Perry*, 570 U.S. 693, 705-706 (2013) (intervenors denied standing to appeal where invalidation of state law did not directly injure them); *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 963-966 (9th Cir. 2015) (en banc) (where Alaska was injured by judgment that a federal rule violated the Administrative Procedure Act, Alaska had standing to appeal even though federal defendants chose not to).

California $400 million in 2020); ROA.1187, 1533 (Oregon and Connecticut have received $432.1 million in CFCO funds). New York and Minnesota would lose billions of dollars from the invalidation of the Basic Health Program (BHP), an initiative that allows States to offer healthcare coverage directly to low-income residents who would otherwise be eligible to purchase it in the individual market. *See* 42 U.S.C. § 18051; ROA.1520, 1551 (New York has received $3.5 billion in BHP funds; Minnesota received $548 million in 2017). These are just a few of the federal funding sources that would disappear if the district court's judgment were to take effect. *See also* ROA.1187-1188, 1191, 1234, 1267, 1510, 1520, 1533. And as the Supreme Court reaffirmed just last week, a State's predictable loss of federal funds "is a sufficiently concrete and imminent injury to satisfy Article III." *Dep't of Commerce v. New York*, No. 18-966, slip op. 10 (June 27, 2019).

The district court's judgment would also impose significant administrative costs on the state defendants. The state defendants have restructured their healthcare systems in reliance on the ACA. Figuring out how to disentangle the Act from state regulatory regimes would be both disruptive and expensive. States would have to spend millions of dollars reprogramming the way they determine who is eligible for Medicaid and issuing notices to those who no longer qualify. ROA.1186-1187 ($3.2 million for Connecticut); ROA.1492-1493 ($1.55 million for Hawaii). And while the full effects of the district court's judgment are difficult

to predict, state healthcare agencies report that it would cost them "many millions of dollars" to transition back to a legal landscape that does not include the ACA. ROA.1540; *see also* ROA.1238-1239, 1242, 1497, 1509, 1515, 1519, 1533, 1545.

The district court's judgment would also increase the States' uncompensated care costs. If given effect, the court's decision would cause millions of people to lose their healthcare coverage. *See* ROA.1223-1224 (32 million more uninsured from a partial repeal of the ACA). And that would lead to the same vicious cycle that plagued the healthcare industry before the ACA was adopted: Newly uninsured individuals would seek belated care in emergency rooms, and hospitals would have to treat them without regard to their ability to pay. *See* 42 U.S.C. § 1395dd; *see generally Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547 (2012) (Roberts, C.J.). Some of those costs would be passed on to the States. *See* ROA.1240, 1243, 1268, 1500, 1534 (documenting drops in uncompensated costs in defendant States since the ACA was adopted); *cf. United States House of Representatives v. Price*, 2017 WL 3271445, at *1 (D.C. Cir. Aug. 1, 2017) (per curiam) (States had standing to challenge district court order upon showing a "substantial risk" that judgment would increase the number of uninsured, which would increase state uncompensated care costs).

In addition to these financial harms, allowing the district court's judgment to remain in place could well adversely affect the state defendants' "'legal rights or

position vis-à-vis other parties in the case or other potential litigants.'" *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 428 & n.2 (5th Cir. 2007). If the federal defendants began dismantling the ACA—either in reliance on the district court's order or perhaps of their own accord—the judgment below would arguably collaterally estop the state defendants from challenging that action in court. *See, e.g.*, *United States v. Jim*, 891 F.3d 1242, 1253 (11th Cir. 2018) (intervening in district court made party "'vulnerable to complete adjudication by the federal court of the issues in litigation between the intervenor and the adverse party'"); *see also id.* at 1253 n.26 (collecting cases). That possibility alone is enough to give the state defendants standing to challenge the district court's judgment. *See Sierra Club*, 995 F.3d at 575 (emphasizing lack of any future preclusive effect in denying standing to appeal); *cf. Fletcher*, 805 F.3d at 602 (party may appeal a favorable judgment upon showing that its collateral estoppel effect "'may harm [it] in future proceedings'").

These harms would flow directly from implementation of the district court's judgment, and would be redressed by its reversal. *See Sierra Club*, 995 F.2d at 574. The federal defendants now argue that the state defendants never proved they would be financially harmed by implementation of the district court's judgment in the *plaintiff* States, and that legally the judgment "cannot be understood as extending beyond the plaintiff states to invalidate the ACA in the intervenor

states." U.S. Supp. Br. 10.[2] The state defendants are not confident that they fully understand these arguments. The federal defendants have not explained how, as a practical matter, they might administer and enforce the ACA in some parts of the country but not in others, or what provisions of the ACA they believe "actually injure" the plaintiffs, U.S. Supp. Br. 5, and thus should be viewed as covered by the district court's judgment as to those parties. Certainly the state defendants cannot rely on unclear arguments or representations made during litigation as likely to control even the future actions of the Executive Branch—let alone the interpretation of the scope and legal effect of the district court's order by other parties or the courts.

The Supreme Court's recent decision in *Bethune-Hill* does not change the standing analysis here. The Court there held that one chamber of a bicameral legislature did not have standing to appeal an order invalidating Virginia's redistricting plan when the Commonwealth's Attorney General chose not to challenge the judgment. *Bethune-Hill*, 139 S. Ct. at 1950. The Court reasoned that the House of Delegates did not have authority to litigate the appeal "on the State's behalf," *id.* at 1951-1953, and that the challenged order did not harm the House "in

[2] While the federal defendants have a singular view of the scope of the judgment below, they continue to treat the district court's declaratory order as the "functional equivalent of an injunction." ROA.2722; *see also* ROA.3020-3021. The district court also understood its judgment as having injunctive effect, leading it to enter a stay pending appeal. *See* ROA.2782-2784.

its own right," *id.* at 1953-1956. The House "as an institution" did not have a "cognizable interest in the identity of its members." *Id.* at 1955. Here, in contrast, the district court's judgment would cause the state defendants "'legally and judicially cognizable'" harm of a direct and conventional sort. *Id.* at 1953. The state defendants would lose hundreds of billions of dollars if the order below went into effect; and it is "well established that a financial loss generally constitutes an injury." *Texas v. United States*, 787 F.3d 733, 748 (5th Cir. 2015).

Finally, the state defendants' intervention in the district court was timely as to all issues in the case. The original 16 intervening States and the District of Columbia moved to intervene six weeks after the original complaint was filed, and before the amended complaint was filed. ROA.220-251 (motion to intervene); ROA.68 (complaint); ROA.503 (amended complaint). Neither any other party nor the district court ever questioned the timeliness of that motion. *See* ROA.949; *Wal–Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (motion timely when filed three months after answer was filed).[3]

2. *Mootness*. In any event, there remains a live controversy between the plaintiffs and the federal defendants on appeal. This case falls squarely within the framework applied by the Supreme Court in *United States v. Windsor*, 570 U.S.

[3] For the reasons explained in their motion, Colorado, Iowa, Michigan, and Nevada also timely moved to intervene in this appeal. *See* ECF No. 514818294, at 12-16.

744, 755-763 (2013). Although the federal defendants now agree with the plaintiffs' legal positions on the merits, they have not dismissed their appeal, and have indicated that they intend to continue enforcing the ACA unless a court orders them not to. *See id*. *at* 758. Implementation of the judgment below would also cause '"real and immediate economic injury'" to the United States. *Id.* at 757-758. And the same prudential considerations that led the Court to exercise jurisdiction in *Windsor*—a sharp adversarial presentation of important issues that affect the lives of millions of Americans—are present here as well. *Id.* at 761

As in *Windsor*, the district court's judgment here—or a decision of this Court affirming that judgment—would require the federal government to take actions that it would not take "but for the court's order." *Windsor*, 570 U.S. at 758-759. The federal defendants have now committed that they will "continue[] to enforce the ACA" pending a "final judicial determination of the constitutionality of the individual mandate as well as the severability of the ACA's other provisions." U.S. Supp. Br. 4. An appellate decision in this case will therefore "have real meaning." *Windsor*, 570 U.S. at 758 (citation and quotation marks omitted). If this Court affirms the judgment below, then (subject to the possibility of Supreme Court review) the federal defendants will begin dismantling the ACA. If this Court reverses, they will instead continue to enforce it. *See* U.S. Supp. Br. 4-5.

Implementing the district court's judgment would also impose legally cognizable harm on the United States. It would invalidate a federal law. *See* U.S. Supp. Br. 5.[4] And like the States, the federal government would have to spend millions of dollars figuring out how to unwind the ACA.[5] More broadly, dismantling the ACA would increase the federal deficit by hundreds of billions of dollars over the next decade. *See* ROA.1147 ($350 billion over 10 years).[6] While the current federal Executive may "welcome the [district court's] order," that does not "eliminate the injury to the national Treasury." *Windsor*, 570 U.S. at 758.

Finally, the same prudential considerations that led the Supreme Court to exercise jurisdiction in *Windsor* are present here. The "sharp adversarial presentation of the issues" by the state defendants and the House allays any "concerns that otherwise might counsel against hearing an appeal from a decision in which the principal parties agree." 570 U.S. at 761. This case also implicates the "rights and privileges" of hundreds of millions of Americans. *Id.* Under the

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[4] *See also INS v. Chadha*, 462 U.S. 919, 931, 939-940 (1983) (when Executive Branch stated that it would take action under a law unless ordered not to do so, it was an "aggrieved party" for purposes of Article III and appellate jurisdiction statute, despite its stated position that the law was unconstitutional).

[5] *See* ROA.2730 (federal defendants' submission indicating that they might have to develop an "extensive plan of compliance" to "transition the healthcare markets out of the ACA framework").

[6] *See also* Comm. for a Responsible Budget, *The Cost of Full Repeal of the Affordable Care Act*, Jan. 4, 2017, https://www.crfb.org/papers/cost-full-repeal-affordable-care-act (repeal would cost federal government $150-$350 billion).

"unusual and urgent circumstances" of this case, the "'prudent[]'" course is to exercise jurisdiction. *Id.*[7]

3. *Vacatur*. The Court's third question asks "what the appropriate conclusion is" if the Court instead holds that (i) there is no live controversy between the plaintiffs and the federal defendants and (ii) none of the intervenor defendants has standing to appeal. If the Court understands this case to be in that posture, it should vacate the judgment below.

The decision whether to vacate a judgment turns on the "equities of the individual case." *Staley v. Harris County, Tex.*, 485 F.3d 305, 312 (5th Cir. 2007) (en banc); *see also Hall v. Louisiana*, 884 F.3d 546, 551 (5th Cir. 2018) (appellate vacatur is "'informed almost entirely'" by the "'twin considerations of fault and public interest'"). When a civil case becomes moot on appeal, vacatur of the judgment below is typically the result "most consonant to justice." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994) (quotation marks omitted); *see generally United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). It ensures that a party is not "forced to acquiesce" in an adverse judgment

[7] Even if this Court concludes that it does not have jurisdiction to hear and decide a full appeal, it still has a "special obligation" to ensure that the district court had jurisdiction to "entertain[] the suit" in the first instance. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (citations and quotation marks omitted). Because the plaintiffs have not established standing, the judgment below must be vacated, even if there is no jurisdiction to resolve any other issue on appeal.

when its attempt to seek review "is frustrated by the vagaries of circumstance" or when mootness results from the "unilateral action of the party who prevailed in the lower court." *Bancorp*, 513 U.S. at 23.[8] Otherwise, the prevailing party would be able to "obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997) (quotation marks and alterations omitted).

In some circumstances, however, the equities and the public interest counsel against vacating a judgment when a case becomes moot on appeal. *See generally Bancorp*, 513 U.S. at 26 ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest."). The Supreme Court recognized one such circumstance in *Bancorp*, where the party that lost below caused mootness through "voluntary action" in the form of a settlement with the prevailing party, entered after the Supreme Court had granted certiorari and received merits briefing. *Bancorp*, 513 U.S. at 24; *see id.* at 20. Under those facts, fairness and equity weighed against vacatur. The losing party had "voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari," and vacatur would have deprived the legal community of the value of an appellate precedent. *Id.* at 25-27. Moreover, allowing vacatur would have encouraged

[8] *See also Motient Corp. v. Dondero*, 529 F.3d 532, 537 (5th Cir. 2008) (vacatur "clears the path for future relitigation by a eliminating a judgment the loser was stopped from opposing on direct review") (citations and quotation marks omitted).

gamesmanship in future cases. If parties knew they could "wash[] away" an unfavorable outcome (especially an unfavorable appellate precedent) by voluntarily mooting a case after an adverse decision, they might "think it worthwhile to roll the dice rather than settle in the district court." *Id.* at 28.[9]

The equitable considerations that weighed against vacatur in *Bancorp* weigh strongly in favor of vacatur here. If this case is now moot, that mootness is the result of the federal defendants' abrupt change in litigating positions before this Court, not of any voluntary action by the plaintiffs who prevailed below. Unlike in *Bancorp*, however, here there is no danger that the federal defendants changed their position in the hope that a resulting vacatur would wash away an adverse decision that they view as inconvenient. To the contrary, they now embrace the district court's judgment, and urge this Court to affirm it on the merits. The consequence of denying vacatur here would thus be to preserve a lower court judgment that the federal defendants now view as favorable, and that would provide them with an ostensible judicial imprimatur for dismantling the entire Affordable Care Act. That would be enormously harmful, not just for the state defendants but also for the millions of Americans who rely on the Act for access to

[9] *See also Bancorp*, 513 U.S. at 29 ("This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course.").

affordable, high-quality healthcare. *See Staley*, 485 F.3d at 314 (courts considering vacatur look to the "the totality of the equities"). It would have the perverse and inequitable effect of allowing the party that (by hypothesis) mooted the appeal to claim that it is bound by a court judgment, while depriving the state defendants and others that are harmed by that judgment—and are in no way at "'fault'" for any mootness—of the opportunity to challenge it. *Id.* at 312.[10] And it would create its own serious risk of gamesmanship. *Cf. Bancorp*, 513 U.S. at 28. That result would be neither equitable nor in the public interest. *See id.* at 26.

Of course, the Court would reach the vacatur question only if it held both that the appeal is moot and that the state defendants lack standing to appeal. And denying the state defendants standing would require the Court to conclude that they are not harmed by the judgment below in any legally cognizable way. *See, e.g.*, *Sierra Club*, 995 F.2d at 575. A necessary premise of that conclusion would be that, even if the judgment remained in effect, it could not have any preclusive effect on the state defendants in future litigation—such as new affirmative litigation challenging actions taken by the federal defendants to dismantle the ACA. *See, e.g.*, *id.*; *supra* 5-6. Vacating the judgment below would properly

[10] *Cf. Wyoming v. Zinke*, 871 F.3d 1133, 1145-1146 (10th Cir. 2017) (vacating judgment entered against federal agency and appealed by intervenors where agency's actions rendered the appeals "prudentially unripe" because the intervenors did not cause the unripeness); *Humane Soc'y of U.S. v. Kempthorne*, 527 F.3d 181, 187-188 (D.C. Cir. 2008) (similar).

reflect that premise, ensuring that the state defendants could not suffer any "adverse consequences in future litigation from the judgment and findings in this case." *Sierra Club*, 995 F.2d at 575.[11] But if the Court concludes that vacatur is inappropriate, it should make very clear (as it did in *Sierra Club*) that if the state defendants lack standing to appeal, it is because the district court's judgment can have no preclusive effect against them. *See id.* The necessary legal principle is that the state defendants may not be legally bound by any judgment that they were affirmatively barred from challenging on appeal.

* * *

This Court retains jurisdiction over this appeal because the district court's judgment harms the state defendants as well as the federal defendants, the Court's resolution of this case will have real consequences, and there has been a sharp adversarial presentation of the issues. But if this Court concludes that the federal defendants' change in legal positions has mooted this appeal, then logic and equity demand vacatur of the district court's judgment; or, at a minimum, a clear holding by this Court that that judgment may not be given preclusive effect against the state defendants in any future litigation.

[11] *See also Kaw Nation v. Norton*, 405 F.3d 1317, 1324 (Fed. Cir. 2005) (vacatur proper to "avoid[] any adverse collateral effects of a judgment mooted during the pendency of the appeal") (citation omitted).

Sincerely,

s/ Samuel P. Siegel

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CERTIFICATE OF SERVICE

I certify that on July 5, 2019, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all other participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 5, 2019

/s Samuel P. Siegel
Samuel P. Siegel

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(4), 32(a)(5), 32(a)(6), and 32(a)(7), and the Court's June 26, 2019 supplemental briefing order, because it is 15 pages and because it has been prepared in Microsoft Word using 14-point Times New Roman font.

Dated: July 5, 2019

/s Samuel P. Siegel
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